

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

No. 77-4005

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4005, 77-4020, 77-4059

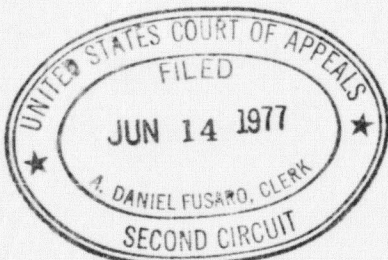
INTERNATIONAL BUSINESS MACHINES CORP., et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order
of the Federal Communications Commission

**REPLY BRIEF FOR PETITIONER INTERNATIONAL
BUSINESS MACHINES CORPORATION**



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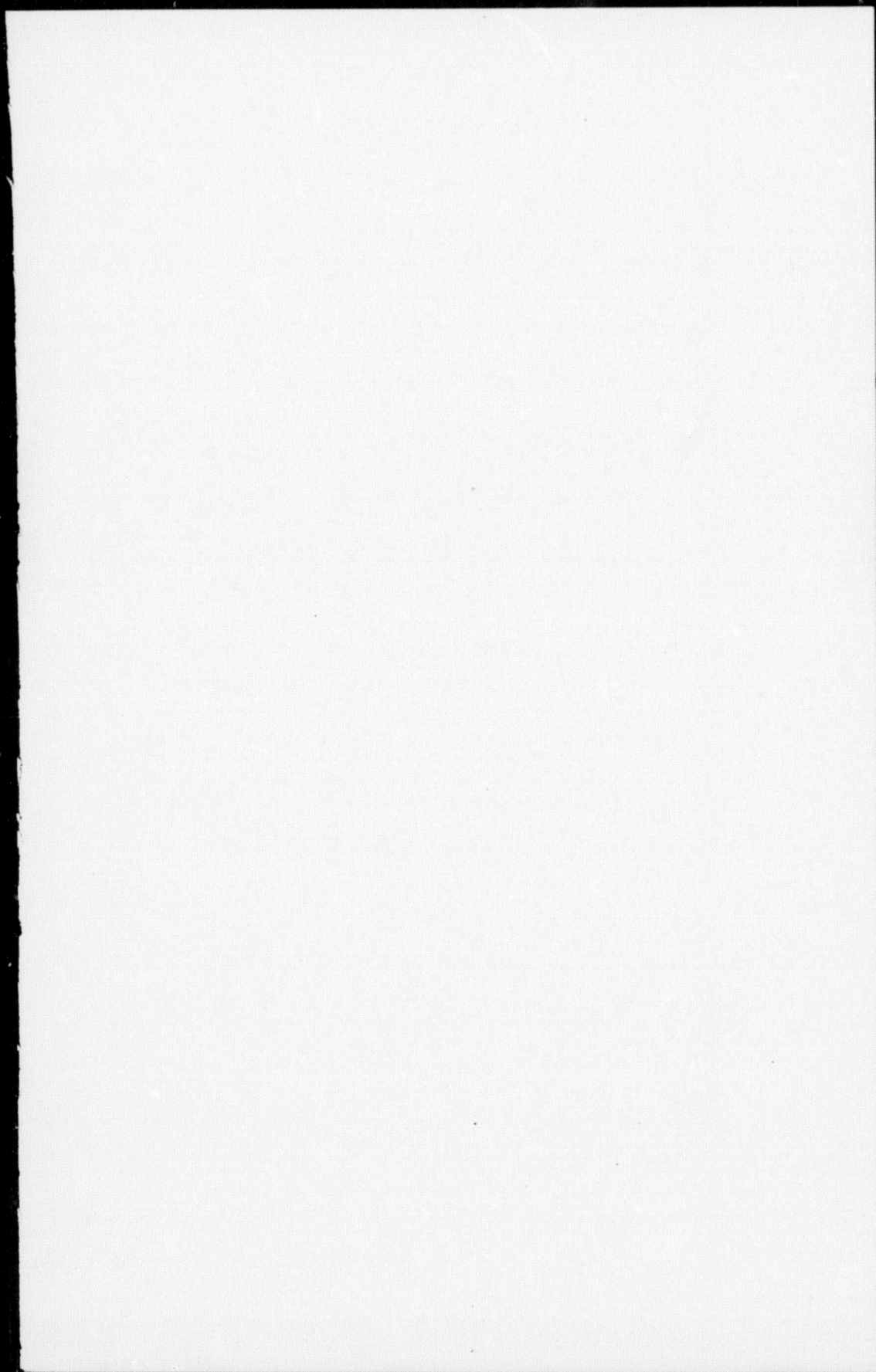


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**REPLY BRIEF FOR PETITIONER INTERNATIONAL
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INTRODUCTION

In Part I, we demonstrate that Respondents and Intervenors have failed to refute our contentions that the Federal Communications Commission ("Commission") erred in reversing the rejection of the Dataspeed 40/4 tariff by the Chief of the Common Carrier Bureau.

In Part II, we demonstrate that the attempts of Respondents and Intervenors to supply *post hoc* justification for the Commission's arbitrary, capricious and unexplained denial of petitions to suspend and investigate the Dataspeed 40/4 tariff are legally inadmissible. Moreover, the necessity for an investigation in this case was particularly acute where the Commission considered that

the case was "close" on the merits, where the Chief of the Common Carrier Bureau found the Dataspeed 40/4 tariff "unlawful on its face," where the Commission has stipulated that it did not consider all of the materials in the record, and where Respondents have acknowledged that the Commission failed to address the public interest considerations relating to the tariffing of the Dataspeed 40/4.

I. RESPONDENTS AND INTERVENORS HAVE FAILED TO JUSTIFY THE COMMISSION'S DECISION TO PERMIT THE DATASPEED 40/4 TO BE TARIFFED.

In our opening brief, we demonstrated that the Commission improperly considered the effect that it believed the 1956 AT&T Consent Decree¹ would have on AT&T's ability to offer the Dataspeed 40/4 if the Dataspeed 40/4 were classified as a data processing device.² In this connection, we relied in part on the explanation of the Commission's action in the Concurring Statement of Chairman Wiley.³

Respondents accuse IBM of being "imaginative, but not accurate" in relying on Chairman Wiley's statement.⁴ Respondents quote Chairman Wiley as follows:

"... my initial judgment has been tempered by a recognition that the original computer Inquiry did not purport to prescribe rules and definitions for ter-

¹ *United States v. Western Electric Co. and AT&T*, 1956 Trade Cases ¶ 71,134 (D. N.J. 1956) ("1956 AT&T Consent Decree").

² Brief for Petitioner International Business Machines Corporation ("IBM Br.") at 18, 32-34.

³ *American Telephone and Telegraph Co. Revisions to Tariffs F.C.C. Nos. 260 and 267 Relating to Dataspeed 40* (Transmittal No. 12449), Memorandum Opinion and Order, 62 F.C.C.2d 21 (1977), III J.A. 969 ("Dataspeed 40/4 Order"), Concurring Statement of Chairman Richard E. Wiley, *id.* at 33, III J.A. 985.

⁴ Brief for Respondents ("Resp. Br.") at 29, n.20.

minals, and by a concern that rigid application by analogy of those rules to terminals might result in denying communications options and alternatives to consumers. This latter concern is particularly significant given the effect of the 1956 Consent Decree on AT&T's ability to offer data terminals"⁵

Contrary to Respondents' assertions, the quoted portion of Chairman Wiley's opinion plainly expresses his concern that the *Computer Inquiry I*⁶ rules should be construed, and the case decided, in a way that does not bar AT&T from providing the Dataspeed 40/4 because of "the effect of the 1956 Consent Decree." The balance of the Chairman's Statement—omitted from Respondents' quotation—reflects the Chairman's conclusion that the Commission was motivated by this same concern:

"The case is obviously a close one Under such circumstances, it is neither surprising, nor inappropriate that the Commission would consider the practical consequences for consumers if they are denied access to desired equipment." 62 F.C.C.2d at 33.

The Commission's decision neither denied nor questioned the Chairman's statement.⁷

The "practical consequences" the Commission took into account derived solely from the Commission's interpreta-

⁵ *Id.*, quoting Concurring Statement of Chairman Wiley, 62 F.C.C.2d at 33, III J.A. 985.

⁶ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities* (Docket No. 16979), Tentative Decision of the Commission, 28 F.C.C.2d 291 (1970), modified, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 F.C.C.2d 293 (1973) ("*Computer Inquiry I*").

⁷ The majority of the Commission is presumed to have considered the expressed view of their concurring colleague. *Braniff Airways v. CAB*, 379 F.2d 453, 460 (D.C. Cir. 1967); *Office of Communication of United Church of Christ v. FCC*, 465 F.2d 519, 523 n.15 (D.C. Cir. 1972). Had the majority regarded the Chairman's statement as inaccurate, it would no doubt have said so.

tion of the 1956 AT&T Consent Decree. AT&T correctly argues (AT&T Br. at 23) that implementation of the 1956 AT&T Consent Decree is not a concern of the Commission but is "exclusively a matter for the District Court" and the Justice Department. For this reason, and in view of *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), we believe the Consent Decree was an improper basis for the Commission's decision in this case.⁸

To avoid the conclusion that the Dataspeed 40/4 is a data processing device, the Commission adopted a classification standard that, as we have shown, will not withstand scrutiny.⁹ The arbitrariness of the Commission's Order is demonstrated by the fact that the purported standard it adopted cannot be applied to any other case¹⁰ and the result it reaches is fundamentally irreconcilable with the underlying policy rationale of *Computer Inquiry I*.¹¹ To support the Commission's ruling, Respondents and

⁸ See IBM Br. at 32. The question in this case is not whether AT&T should be permitted to furnish the Dataspeed 40/4—which IBM believes it clearly should (*see id.* at 33)—but whether AT&T should be permitted to provide data processing service under tariff.

⁹ *Id.* at 23-34.

¹⁰ "[O]ur decision herein must necessarily be limited in its applicability to the revisions as stated in the pages accompanying" the Dataspeed 40/4 tariff. Dataspeed 40/4 Order, 62 F.C.C.2d at 31, III J.A. 982. "[T]his decision should be viewed as a conclusion of transitory import." Concurring Statement of Chairman Wiley, 62 F.C.C.2d at 33-34, III J.A. 987.

¹¹ See IBM Br. at 23-26. Respondents admit that the Commission did not analyze the public interest consequences of tariffing the Dataspeed 40/4 in terms of the procompetitive policy considerations at the heart of *Computer Inquiry I*. Resp. Br. at 27-28. AT&T's attempt to rationalize the Order with the policy of *Computer Inquiry I* (AT&T Br. at 18-19) is inadmissible because it was not relied on by the Commission. See pages 9-10 note 25 *infra*. As to the policy considerations which prompted the Commission to adopt the "maximum separation rule," Respondents and Intervenor merely beg the question by arguing that the rule does not apply to communications devices. Resp. Br. at 28; AT&T Br. at 18; Brief of Intervenor United States Independent Telephone Association ("USITA Br.") at 19.

Intervenors have tried to minimize the scope of the *Computer Inquiry I* decision and to downplay the capabilities of the Dataspeed 40/4.

Respondents and Intervenors erroneously restrict the meaning of the term "computer" in the *Computer Inquiry I* definition of "data processing"¹² to a "central computer."¹³ That definition neither contains the phrase "central computer" nor reasonably permits such a restrictive reading. When the Commission wanted to say "central computer" in its *Computer Inquiry I* rules, it did so.¹⁴

Respondents' argument would lead to the fallacious conclusion that a service consisting of a device supplied by a carrier that everyone would agree is a data processing device and a transmission line attached to a customer's central processing unit ("CPU") is a tariffable

¹² 47 C.F.R. § 64.702(a)(1) defines "data processing" as:

"the use of a computer for the processing of information as distinguished from circuit or message-switching. 'Processing' involves the use of the computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging, and calculating data, according to programmed instructions."

¹³ Resp. Br. at 20-28; AT&T Br. at 13-16; USITA Br. at 7-10. Respondents' and Intervenors' attempt (*id.*) to rely on this Court's decision in *GTE Service Corp. v. FCC*, *supra*, is disingenuous. That case did not involve, and this Court did not purport to decide, any questions concerning the application of *Computer Inquiry I* to remote devices.

¹⁴ The Commission defined "remote access data processing" in terms of a "central computer," "remote customer terminals," and "communications facilities." 47 C.F.R. § 64.702(a)(4). That definition unmistakably distinguished the communications element—the wires—from the central and remote data processing elements. See IBM Br. at 28-29.

Respondents' limited construction of the term "computer" also ignores the significance of the development of distributed data processing—the geographical dispersal of parts of a computer or data processing system. See *id.* at 7-12.

communications service under the *Computer Inquiry I* rules because the carrier supplies only the data processing device and line, but not the CPU. Under this rationale, a carrier would be permitted to tariff any device in combination with a line, regardless of its data processing capabilities, as long as the carrier does not offer a "central computer" as well.

Respondents and Intervenorers erroneously contend that in determining whether the Dataspeed 40/4 is a data processing or communications device, it is improper to consider its dependent relationship with the CPU.¹⁵ Respondents' argument ignores the significance of the development of distributed data processing.¹⁶ To consider the Dataspeed 40/4 and the transmission line in isolation from the CPU which is essential to the operation of the Dataspeed 40/4 is entirely unrealistic.¹⁷ The Dataspeed 40/4 simply does not have any purpose in the absence of the CPU and is a necessary component of a data processing system.¹⁸

¹⁵ Resp. Br. at 32; AT&T Br. at 17-18, 27-29. IBM has previously demonstrated that since the Dataspeed 40/4 is an input/output device that can operate only as an interactive element of a data processing system and cannot even initiate a transmission except on command of the CPU, analysis should properly focus on the entire system in which the Dataspeed 40/4 operates. See IBM Br. at 39-42. AT&T mischaracterizes IBM's position by stating that IBM contends it is necessary to focus on the business activity of the customer. AT&T Br. at 18. Of course, IBM makes no such argument and would readily agree to the irrelevant proposition that the transaction of banking over a private line obtained from AT&T does not make AT&T a bank.

¹⁶ See IBM Br. at 7-12.

¹⁷ AT&T contends that the "ultimate absurdity" of IBM's argument is that it would prevent AT&T from offering the telephone line under tariff. AT&T Br. at 20. IBM makes no such argument.

¹⁸ The Supplemental Notice in *Computer Inquiry II*, confirming IBM's contentions in this regard, stated that in determining whether a device is data processing or communications, it is appropriate to focus on the processing "activity" as a whole, which

Respondents and Intervenor also contend that the Dataspeed 40/4 cannot be deemed a data processing device because it is an evolutionary derivation of the teletypewriter.¹⁹ Even if lineage were thought to be relevant,

the Commission defines as the "aggregate end result of a combination of operations, *no matter where performed.*" *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer Inquiry)* (Docket 20828), Supplemental Notice of Inquiry and Enlargement of Proposed Rulemaking, FCC 77-151 (released March 8, 1977) ("Supplemental Notice") at 10 n.19 (emphasis added). Respondents and Intervenor now contend, despite the plain language of the Supplemental Notice, that "the 'activities' focused on will still be just those 'incorporated into a carrier's communications offering,' . . . and will not include customer supplied equipment." Resp. Br. at 33 n.23; AT&T Br. at 21 n.38. In short, they seem to contend that when the Commission said "no matter where performed" it meant just the opposite. The argument falls of its own weight.

¹⁹ Resp. Br. at 34-38; AT&T Br. at 17, 24-26; USITA Br. at 12-13. Respondents contend that two precedents support the claim that the Dataspeed 40/4 should be tariffed because it evolved from the teletypewriter. Resp. Br. at 37. First, Respondents cite a letter decision of the Chief of the Common Carrier Bureau with respect to the Dataspeed 40/3 (*id.* at 34 and Addendum A-1). The most important aspect of this precedent is that in the instant case the Chief of the Common Carrier Bureau saw an enormously important difference between the Dataspeed 40/3 and 40/4 for he flatly concluded that the tariff for the Dataspeed 40/4 was unlawful on its face because the Dataspeed 40/4 was in a

"class of equipment, designed from their inception to be used and marketed solely for the input, output, formatting, and conversion of computer-based data,"

was not

"intended for, nor indeed capable of, basic terminal-to-terminal transmission of record (hard-copy) or other messages . . .,"

but rather was

"intended instead for either on-site or remote-access interaction with a central computer storage and/or processing unit."

American Telephone and Telegraph Co. Revisions to Tariffs F.C.C. Nos. 260 and 267 (Transmittal No. 12449), Memorandum Opinion and Order of the Chief, Common Carrier Bureau (released March 3, 1976), II J.A. 644 ("Common Carrier Bureau Order") at 5, II J.A. 648.

The second is no precedent at all, but an aside in a memorandum from the Communications Division of the New York Public Service

it would not determine the question. As in biology, there are some generational changes that qualitatively distinguish the offspring from its parentage. Whatever the situation was with respect to conventional teletypewriters, there are numerous significant differences between the teletypewriter and the Dataspeed 40/4.²⁰ Respondents' Brief illustrates these differences in graphic terms. Respondents first stated that:

"... in 1971 the remote access device was simply a teletypewriter, linked to a central computer by communications channels. In remote access data processing the *computer did the data processing, not the teletypewriter.*"²¹

Commission to that Commission concerning the Dataspeed 40/4 in a situation in which no complaint had been filed. Resp. Br. at 37 and Addendum A-4. Respondents seriously mischaracterize that memorandum by omitting a critical part of the statement. In the following quotation, the language omitted by the Respondents is italicized:

"... we are of the opinion that DATASPEED 40 is functionally similar to existing teletype services and as such constitutes basic telephone service. *If IBM does file a formal complaint in this regard, evaluation of the material presented will be required prior to any recommendation to the Commission.*" *Id.* at Addendum A-4, p. 6.

²⁰ See IBM Br. at 38-39. The modest appraisals of the Dataspeed 40/4 made in Respondents' and Intervenor's briefs (Resp. Br. at 11-12, 34-36; AT&T Br. at 6; USITA Br. at 12-13) contrast sharply with AT&T's promotional literature. In a filing with the New York Public Service Commission, an AT&T affiliate has stated that the Dataspeed 40/4 was designed "for applications requiring efficient *data preparation and retrieval*..." as contrasted to use "in *message oriented systems which in the past would have utilized teletypewriter equipment*" ("Description of Service," II J.A. 442 (emphasis added)); and that the Dataspeed 40/4's

"efficient *interactive* mode of operation will make it extremely attractive for *computer input-output applications* such as inquiry-response, data entry and data retrieval." Teletype Synchronous Model 40/4 Data Terminals Catalog at 2, I J.A. 209 (emphasis added).

²¹ Resp. Br. at 24 (emphasis added). Respondents are incorrect in asserting that the teletypewriter was the only remote access

Respondents then state that the Commission's Order held Dataspeed 40/4 to be "a combination of both communications and data processing."²²

Respondents and Intervenor contend that Sections 2(a), 3(a) and 3(b) of the Communications Act,²³ as embellished by a "gloss" AT&T finds in various cases, compel the conclusion that the Dataspeed 40/4 must be tariffed.²⁴ These statutory arguments are *post hoc* explanations never relied on by the Commission in its Dataspeed 40/4 Order and therefore may not properly be considered by the Court.²⁵ The Commission's Order never

device for data processing systems available in 1971. See, e.g., Response of the Bunker-Ramo Corporation in *Computer Inquiry I*, at 8:

"In 1964, Bunker-Ramo began installation of the Telequote III Stock Quotation Inquiry System. . . . It consists primarily of a desktop unit employing keyboard and cathode ray tube . . . display. The more than 12,000 terminals utilized in the system and associated control units are connected over voice grade lines leased by Bunker-Ramo from communications common carriers"

²² Resp. Br. at 37, quoting Dataspeed 40/4 Order, 62 F.C.C.2d at 30, III J.A. 981 (emphasis added).

The Intervenor also contend (AT&T Br. at 26-27; USITA Br. at 14-16)—although Respondents notably do not—that the Dataspeed 40/4 cannot be deemed a data processing device because it "does not process the data it transmits to alter the meaning or semantic content of the data." AT&T does not deny, as it cannot, that the Dataspeed 40/4 processes data in ways that do not involve alteration of the meaning or semantic content of the data. For example, the operations of storing, retrieving, and sorting data—which are explicitly recognized as "data processing" by the *Computer Inquiry I* rules (47 C.F.R. § 64.702(a)(1))—do not involve alteration of the meaning or semantic content of the data.

²³ 47 U.S.C. §§ 152(a), 153(a), and 153(b).

²⁴ Resp. Br. at 30-38; AT&T Br. at 23-24; USITA Br. at 11-12.

²⁵ "The difficulty with the [FTC's] position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order. 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'"

FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 246 (1972), quoting

mentioned Sections 2(a), 3(a), or 3(b) of the Communications Act, or the cases on which AT&T relies.²⁶

In any case, Respondents' and Intervenor's contention that the Dataspeed 40/4 must be tariffed under Sections 3(a) and (b) of the Act—because it is assertedly an instrumentality or apparatus “incidental to” transmission by wire—is illogical. The Dataspeed 40/4 cannot initiate any transmission. It transmits only upon command of the CPU. Thus, the CPU is, if anything, more fundamentally involved in transmission than the Dataspeed 40/4.²⁷ If the argument based on the “incidental to” language of Sections 3(a) and (b) were correct, it would lead to the obviously untenable conclusion that the CPU or “central computer” was also a tariffable communications common carrier device.²⁸

Investment Co. Institute v. Camp, 401 U.S. 617, 628 (1971). “The courts may not accept appellate counsel's *post hoc* rationalizations for agency action” *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); see *SEC v. Chenery*, 318 U.S. 80 (1943).

²⁶ If the Commission was in fact relying on a construction of these statutory definitions, it becomes apparent that the Commission silently assumed that it had no power to forbear from tariffing the Dataspeed 40/4 if that device fell within one of the statutory definitions of communications common carriage. Otherwise, the Commission would have discussed whether it was appropriate to exercise its power to forbear in these circumstances. Since any such decision of the Commission *sub silentio* that it lacked such power would reflect an erroneous conclusion of law, this case would, in that event, have to be remanded to permit the Commission to consider whether to exercise its discretion to forbear in the circumstances presented.

²⁷ AT&T contends that “without . . . [the Dataspeed 40/4], there would be no transmission at all.” AT&T Br. at 24. In fact, it is just as apt to state that “without the CPU, there would be no transmission at all.”

²⁸ None of the parties or intervenors in this case contend that a CPU is a tariffable communications device.

Respondents also rely on *North Carolina Utilities Comm'n v. FCC*, No. 76-1002 (4th Cir. March 22, 1977), *cert. pending* (October

In sum, Respondents and Intervenors have failed to refute IBM's showing that the Dataspeed 40/4 tariff was unlawful and should have been rejected.

II. RESPONDENT'S AND INTERVENORS' *POST HOC* EXPLANATIONS FAIL TO JUSTIFY THE COMMISSION'S ARBITRARY AND CAPRICIOUS REJECTION OF PETITIONS TO INVESTIGATE THE DATASPEED 40/4 TARIFF.

Even if the Commission were correct in denying IBM's petition to reject the Dataspeed 40/4 tariff, the case should nevertheless be remanded because the Commission's *de facto* denial of petitions to suspend and investigate the tariff was erroneous.

IBM's principal brief pointed out that the Commission denied without explanation requests for investigation of the Dataspeed 40/4 tariff.²⁹ Respondents and Intervenors do not dispute this fact. Instead, they advance supposed justifications for the Commission's actions that were not relied on by the Commission and are, in any case, unpersuasive.

Respondents suggest that the Commission decided to remit IBM and the other petitioners to their Section 208³⁰

Term, 1976, No. 76-1675), for the proposition that the vindication of the Commission's authority to require registration of carrier and customer protective connecting arrangements somehow supports the decision here. Resp. Br. at 31. The argument is frivolous. The argument that the Commission may require registration of protective connecting arrangements to insure the integrity of common carrier service has nothing to do with the question of what kinds of devices may be offered as communications services subject to tariff.

²⁹ IBM Br. at 42, 49.

³⁰ 47 U.S.C. § 208 provides:

"Any person . . . complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Com-

remedies and permit the Dataspeed 40/4 tariff to go into effect for the indefinite future.³¹ But this suggestion wholly lacks support in the Commission's Order, which does not mention Section 208.³² The Dataspeed 40/4 Order must be judged by what the Commission said, not by *post hoc* rationalizations offered by counsel.³³

Even if the Commission had considered Section 208, its failure to act on a threshold showing of admittedly "close" questions³⁴ respecting the Dataspeed 40/4 tariff could not be justified. The availability of an alternative remedy does not permit the Commission to abdicate its administrative responsibility. It offends basic notions of administrative economy and fairness to litigants to suggest that the Commission can reject without explanation a fully briefed and documented Section 204 petition be-

mission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission If such carrier . . . shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. . . ."

³¹ Resp. Br. at 41, 45-46, 48-49. AT&T also seems to suggest that the Commission relied on the availability of a Section 208 complaint proceeding as a ground for denying the petitions to investigate. AT&T Br. at 38, 41, 42-43.

³² Respondents misleadingly characterize the Dataspeed 40/4 Order as reflecting the "Commission's choice not to suspend and investigate the Dataspeed 40/4 filing and leave petitioners to their Section 208 complaint remedies. . . ." Resp. Br. at 48. The Commission not only failed to mention Section 208 in its Order, it failed to mention its decision not to investigate the tariff.

³³ See pages 9-10 note 25 *supra*. USITA's contention that the Commission should be given leeway to "select remedies" (USITA Br. at 23) fails for the same reason.

³⁴ See page 15 note 38 *infra*.

cause the petitioners have the theoretical opportunity to start all over again by filing essentially the same petition under another section of the statute.

Respondents and Intervenor contend that the Commission was not obligated to articulate its reasons for rejecting the petitions to investigate because such decisions are committed to agency discretion and are not reviewable.³⁵ The suggestion that this Court is powerless to review this aspect of the Commission's decision is contrary to settled principles of administrative law.

"Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). "Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. Nonreviewability is "an exception which must be demonstrated." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). The presence of a permissive term like "may" in Section 204 is not sufficient to overcome this strong presumption in favor of judicial review. *Id.* at 165-66; *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1097-98 (D.C. Cir. 1970). See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Respondents have not carried their heavy burden of demonstrating that the Commission's refusal to investigate the Dataspeed 40/4 is unreviewable.

As this Court has recognized, even discretionary agency decisions can be reviewed for abuse of that discretion. *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715, 717-19 (2d Cir. 1966) (Friendly, J.); see *Mulloy v. United States*, 398 U.S. 410, 415-16

³⁵ Resp. Br. at 48-49; AT&T Br. at 38-40; USITA Br. at 7 n.10.

(1970); *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971); *Scanwell Laboratories v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970); see also *FCC v. Schreiber*, 381 U.S. 279, 291 (1965). Delegated power cannot be exercised arbitrarily. See L. Jaffe, *Judicial Control of Administrative Action* 374-75 (1965). It is indisputable that a court cannot meaningfully review an agency decision for abuse of discretion without knowing, at a minimum, the reasons behind the agency's decision. See *Environmental Defense Fund v. Hardin*, *supra*, 428 F.2d at 1099-1100; IBM Br. at 62-63.

The cases relied on by Respondents and Intervenor to support their claim of nonreviewability are inapposite. *E.g.*, *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963); *United States v. SCRAP*, 412 U.S. 669 (1973). As the Supreme Court recently made clear, those cases do not stand for the proposition that an agency refusal to suspend a tariff pending investigation is immune from judicial review; rather, their "rule . . . is one barring courts from entering disruptive injunctions against collection of rates not finally declared lawful or unlawful by" an agency. *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 316-17 (1975) ("*SCRAP II*"). The present case does not involve a request for an injunction pending an investigation by an agency; it involves an effort to compel an agency to hold an investigation it has refused to hold.

Respondents and Intervenor also rely on a number of cases, all of which preceded *SCRAP II*, that involve disputes as to the reasonableness of a rate for a service.³⁶ Courts may understandably be reluctant to interfere with the delicate balancing of interests when economic questions regarding the reasonableness of the amount of a rate in a tariff are at issue. But the Dataspeed 40/4 case does not involve questions related to the reasonable-

³⁶ Resp. Br. at 49 nn.42-43; AT&T Br. at 39-40 nn.76-80.

ness of a rate; rather it presents the quite different question whether AT&T can lawfully tariff the device at all. That essentially legal determination, requiring the interpretation of statutes and regulations, has not been held to be immune from judicial review.³⁷

As previously noted, the requirement that the Commission explain its reasons was particularly important in this case, where the Commission found and Respondents concede that the case was "close" on the merits,³⁸ where the Chief of the Common Carrier Bureau found the Dataspeed 40/4 tariff "unlawful on its face,"³⁹ where the Commission has stipulated that it did not consider all of the materials in the record,⁴⁰ and where Respondents have acknowledged that the Commission failed to address the public interest considerations relating to the tariffing of the Dataspeed 40/4.⁴¹ Respondents and Intervenor cite no case upholding an agency's unexplained failure to order an investigation before ap-

³⁷ AT&T also cites cases (AT&T Br. at 39 n.76) to support the proposition that an agency's refusal to investigate "alleged violations" is unreviewable. Those cases are irrelevant. Unlike the instant case, those cases deal with an agency's discretion to decide whether to prosecute a charge in an adjudicatory proceeding involving alleged past wrongdoing.

³⁸ Dataspeed 40/4 Order, 62 F.C.C.2d at 31, III J.A. 982. Resp. Br. at 18, 38. For example, Respondents state that:

"The Dataspeed 40/4 comes close to the line dividing communications from data processing, and incorporation of additional features might push such a service over that line." Resp. Br. at 18.

AT&T overzealously attempts to suggest that the case was not close (AT&T Br. at 41-42)—a position at odds with the record, the Dataspeed 40/4 Order, and the views of all other parties including the Commission.

³⁹ Common Carrier Bureau Order at 7, II J.A. 650.

⁴⁰ See Stipulation 2 of counsel in No. 77-4059 dated March 10, 1977.

⁴¹ Resp. Br. at 27, 49.

proving a tariff where the agency itself has conceded that the lawfulness of the tariff is seriously suspect. No case so holds.

It is difficult to understand Respondents' and Intervenor's assertion that consensus among the parties on factual issues obviates the need for a hearing.⁴² Respondents have conceded that the underlying policy issues remain unresolved and require further investigation.⁴³ Apparently because the Commission recognized the critical importance of these unresolved policy issues, the Commission made its "determination in the Dataspeed 40/4 matter . . . expressly . . . subject to any determinations which might be reached in" *Computer Inquiry II*.⁴⁴

AT&T asserts that IBM is asking for an "evidentiary hearing" and that no such hearing is necessary, on the ground that there are no disputed issues of adjudicative fact.⁴⁵ But AT&T's argument misses the mark. IBM does not contend that a trial-type evidentiary hearing is required for the issues raised by IBM in this case. Those issues relate primarily to the admittedly unresolved public interest and policy questions raised by the tariffing of the Dataspeed 40/4. As IBM suggested in its principal brief, on remand the Commission could be left free to conduct an investigation of the Dataspeed 40/4 tariff alone or to

⁴² *Id.* at 26 n.17; AT&T Br. at 41.

⁴³ Respondents state (Resp. Br. at 27, 49) that the "whole subject of remote access terminals was to be studied in depth" in *Computer Inquiry II. Amendment of Section 64.702 of The Commission's Rules and Regulations* (Docket 20828), Notice of Inquiry and Proposed Rulemaking, 61 F.C.C.2d 103 (1976) ("*Computer Inquiry II*").

⁴⁴ Resp. Br. at 18. *But cf.* AT&T Br. at 13:

" . . . The Commission has made clear that its purpose in the new proceeding is not to make determinations about individual service offerings but to consider possible policies and rules of general applicability."

⁴⁵ AT&T Br. at 41-42.

consolidate an investigation of the issues raised by IBM with the ongoing *Computer Inquiry II* proceeding.⁴⁶ Only a reversal of the Commission's Order will clear the way for a proper evaluation of the critical issues involved. If, as we contend, the Commission's Order is defective in a variety of respects, including its inappropriate effort to make it possible for AT&T to offer the Dataspeed 40/4 despite the 1956 AT&T Consent Decree, the defective Dataspeed 40/4 decision should not be permitted to "carry momentum" into *Computer Inquiry II*. *California v. FPC*, 369 U.S. 482, 489 (1962).

Respondents and Intervenor finally argue that no remand is necessary because the Commission cannot now suspend the Dataspeed 40/4 tariff. Respondents contend that Section 204's five month maximum suspension period has expired.⁴⁷ This argument is untenable. The Dataspeed 40/4 tariff has never been suspended, so the maximum period for suspension has never commenced. After the Chief of the Common Carrier Bureau rejected the Dataspeed 40/4 tariff as unlawful on its face,⁴⁸ it was returned to AT&T. Contrary to Respondents' suggestion, the tariff was not suspended during this period. When the Commission reversed the Chief of the Common Carrier Bureau, the Commission permitted AT&T to "re-file" the tariff; the Commission did not purport to lift a suspension which had not occurred.⁴⁹

⁴⁶ *Computer Inquiry II* may not be a suitable forum for investigation of questions raised by other parties.

⁴⁷ Resp. Br. at 49; AT&T Br. at 21, 37 n.71.

⁴⁸ Common Carrier Bureau Order at 7, II J.A. 650.

⁴⁹ Resp. Br. at 16; Dataspeed 40/4 Order, 62 F.C.C.2d at 32, III J.A. 984. AT&T further suggests that the Dataspeed 40/4 tariff cannot now be suspended because the tariff has already gone into effect. AT&T Br. at 37 n.71. AT&T's suggestion is erroneous. Indeed, the position AT&T takes here is irreconcilable with its position in *MCI Telecommunications Corp. v. FCC*, No. 75-1635 (D.C. Cir.), where it contends that a tariff can be rejected without a hearing eight months after it has gone into effect. Brief of Intervenor American Telephone and Telegraph Company.

CONCLUSION

For the foregoing reasons and the reasons stated in IBM's principal brief, the Commission's Order should be reversed and the matter remanded with instructions to reject the Dataspeed 40/4 tariff. In the alternative, the Commission should be required to conduct an appropriate investigation (as a part of or separate from *Computer Inquiry II*) into the lawfulness of the Dataspeed 40/4 tariff.

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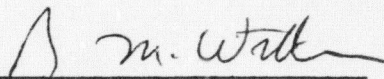
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